Supreme Court, U.S.
FILED

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No. 02-1512 APR 10 2003

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IN THE

United States Supreme Court

ARBON STEEL & SERVICE CO., INC.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ of Certiorari
To The U.S. Court Of Appeals For The Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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37 pp

QUESTIONS PRESENTED

1. Does the U.S. Federal Circuit Court of Appeals' construction of 26 U.S.C. §4462(f)(3) and 28 U.S.C. §2411 as precluding prejudgment interest on refunds of unconstitutional Harbor Maintenance Taxes assessed on vessel cargo exports render petitioner's post-deprivation remedy so inadequate as to violate the Fifth Amendment guaranty against deprivation of property with Due Process of law?

PARTIES TO THE PROCEEDINGS BELOW

The caption identifies the parties to the proceedings below.

RULE 29.6 STATEMENT

Petitioner Arbon Steel & Service Co., Inc., is a closely held corporation. There are no parent corporations nor do any publicly held companies own 10 percent or more of the corporate petitioner's stock.

PETITION FOR A WRIT OF CERTIORARI

Petitioner Arbon Steel & Service Co., Inc., respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Federal Circuit (Pet. App. a2-a10 , App. No. 02-1299) is reported at 2003 US App [LX 337]. The opinion of the United States Court of International Trade (Pet. App. a11-a29, Slip Op. 01-144) is published at 178 F.Supp.2d 1354 (2001).

JURISDICTION

The final judgment of the U.S. Court of Appeals for the Federal Circuit was entered on January 10, 2003 (Pet. App. At page a1). This Court has jurisdiction under 28 U.S.C. §1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Appendix (Pet. App. a30-a32) sets forth verbatim the following constitutional and statutory provisions: U.S. CONST. Amend. V; 26 U.S.C. §4462(f)(3); 28 U.S.C. §2411; 28 U.S.C. §2516(a); and, Section 177 of the former Judicial Code.

STATEMENT OF THE CASE

The petition involves whether prejudgment interest must be paid on refunds of unconstitutional Harbor Maintenance taxes ("HMT") assessed on vessel cargo exports which were unanimously found to violate the Constitution's Export Clause in *United States v. United States Shoe Corp.*, 523 U.S. 360 (1998) (*U.S. Shoe I*).

Upon remand of *U.S. Shoe I*, the Court of International Trade ordered the United States to refund the HMTs assessed on exports together with interest thereon. On appeal, however, the Federal Circuit reversed the interest award. *United States Shoe Corp. v. United States*, 296 F.3d 1378 (Fed. Cir. 2002) (*U.S. Shoe* II). The issues of whether Congress intended to waive the Federal government's immunity from prejudgment interest liability and whether

such a waiver is necessary in cases involving refunds of illegally assessed taxes is the subject of a *Petition for a Writ of Certiorari* presently pending before the Court in *Shoe II* (*United States Shoe Corporation, Petitioner v. United States,* Supreme Court Docket No. 02-1221, 2-21-2003). Pursuant to the Federal Circuit's decision in *U.S. Shoe II*, payment of prejudgment interest on the petitioner's refunds at bar was denied.

REASONS FOR GRANTING THE WRIT OR, ALTERNATIVELY, FOR STAYING ACTION THEREON PENDING DISPOSITION OF UNITED STATES SHOE CORPORATION'S PETITION IN SUPREME COURT DOCKET 02-1221

Supreme Court jurisprudence and relevant legislative history make abundantly clear that, as codified in Section 177(a) of the former Judicial Code, the "*traditional rule*" that prejudgment interest cannot be recovered against the United States absent an express provision to that effect excluded the equally well-"*settled rule*" codified in former Section 177(b) thereof that prejudgment interest is always recoverable in suits to recover moneys illegally exacted as taxes without any statute to that effect.

Since neither the "*traditional rule*" embodied in section 177(a) of the former Judicial Code nor the "*settled rule*" embodied in section 177(b) thereof were changed when recodified under 28 U.S.C. §2516(a) and §2411, respectively, it is clear that neither on 2411 nor its predecessor, section 177(b), were intended to satisfy the statutory consent criterion of the "*traditional rule*" codified under former section 177(a) or, its successor, 28 U.S.C. §2516(a).

As recognized by former Chief Justice Brennan when speaking for the majority in *McKesson Corp. v. Florida*, 496 U.S. 18, 32 (1990), "[b]*ecause exaction of a tax constitutes a deprivation of property*," procedural safeguards against unlawful exactions must be provided "*in order to satisfy the commands of the Due Process Clause.*" Petitioner respectfully submits that a "fair reading" of the majority's decision in *Rosewell v. LaSalle National Bank,* 450 U.S. 503 (1981), as well as Justice Steven's forceful dissent therein both support that proposition that, due to the general proscriptions against declaratory and injunctive relief, the requirement for payment of prejudgment interest in suits to recover moneys illegally exacted as Federal taxes provided in 28 U.S.C. §2411 continues to safeguard an aggrieved taxpayer's right against deprivation of property without Due Process by ensuring the adequacy of his post-deprivation remedy at law.

CONCLUSION

For the foregoing reasons, petitioner respectfully submits that a writ of certiorari should be granted or, alternatively, a decision thereon should be stayed pending disposition by the Court of United States Shoe Corporation's petition in *U.S. Shoe II.*

Respectfully submitted,

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Dated: April 10, 2003,
New York, NY

APPENDIX

United States Court of Appeals for the Federal Circuit

02-1299

ARBON STEEL & SERVICE CO., INC.

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee.

Judgment

ON APPEAL from the UNITED STATES COURT OF INTERNATIONAL TRADE

In CASE NO(S). 98-10-02987

This CAUSE having been heard and considered, it is

ORDER and ADJUDGED:

AFFIRMED

ENTERED BY ORDER OF THE COURT

DATED: JAN 10 2003

Jan Horbaly, Clerk

ISSUED AS A MANDATE: MARCH 3, 2003

United States Court of Appeals for the Federal Circuit

02-1299

ARBON STEEL & SERVICE CO., INC.,

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee.

John J. Galvin, Galvin & Mlawski, of New York, New York, argued for plaintiff-appellant. Of counsel was Jack D. Mlawski.

Jeanne E. Davidson, Deputy Director, Commercial Litigation Branch, Civil Division, Department of Justice, of Washington, DC, argued for defendant-appellee. With her on the brief were Robert D. McCallum, Jr., Assistant Attorney General; David M. Cohen; and Jeffrey A. Belkin, Trial Attorney. Of counsel on the brief was Richard McManus, Senior Attorney, Office of the Chief Counsel, United States Customs Service, of Washington, DC.

Appealed from: United States Court of International Trade

Judge Jane A. Restani

United States Court of Appeals for the Federal Circuit

02-1299

ARBON STEEL & SERVICE CO., INC.,

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee.

DECIDED: January 10, 2003

Before MAYER, Chief Judge, SCHALL and LINN, Circuit Judges.

MAYER, Chief Judge.

Arbon Steel & Service Company, Inc. ("Arbon Steel") appeals the judgment of the United States Court of International Trade denying prejudgment interest on fees paid under the export provision of the Harbor Maintenance Tax. Swisher Int'l, Inc. v. United

States, 178 F. Supp. 2d 1354 (Ct. Int'l Trade 2001). Because interest is not available under 28 U.S.C. § 2411 or the Constitution, we affirm.

Background

The Harbor Maintenance Tax was enacted by Congress as part of the Water Resources Development Act of 1986. 26 U.S.C. §§ 4461-4462 (2000). It levied a 0.125 percent ad valorem tax on commercial cargo for any port use. Id. § 4461(b). In 1995, the Court of International Trade decided that the tax imposed on exports was unconstitutional because it violated the Export Clause's mandate that "[n]o Tax or Duty shall be laid on Articles exported from any State." U.S. Const. art. I, § 9, cl. 5; United States Shoe Corp. v. United States, 907 F. Supp. 408 (Ct. Int'l Trade 1995). On appeal, this court agreed that the tax was unconstitutional, United States Shoe Corp. v. United States, 114 F.3d 1564 (Fed. Cir. 1997), and the

Supreme Court affirmed, stating that the tax "is not a fair approximation of services, facilities, or benefits furnished to exporters, and therefore does not qualify as a permissible user fee," United States v. United States Shoe Corp., 523 U.S. 360, 363 (1998). Arbon Steel recovered the $24,357.56 in fees it had paid with respect to exports under the statute. Arbon Steel & Serv. Co. v. United States, No. 98-10-02987 (Ct. Int'l Trade Jan. 24, 2002).

The question of whether the parties that recovered the unconstitutional fees are entitled to prejudgment interest was then tried. In International Business Machines Corp. v. United States, 201 F.3d 1367 (Fed. Cir. 2000), we decided that no statutory interest was available under tax statute, 28 U.S.C. § 2411, or customs statutes, 28 U.S.C. § 2644 or 19 U.S.C. § 1505(c). In United States Shoe Corp. v. United States, 296 F.3d 1378 (Fed. Cir. 2002), we held

that the Constitution does not mandate the payment of interest because neither the imposition of the tax nor the government's alleged retention of earned interest constituted a Fifth Amendment taking; the Export Clause does not require the payment of interest; and the tax was not so arbitrary as to violate the Due Process Clause of the Fifth Amendment. We also reasoned that under the "no-interest rule" articulated in Library of Congress v. Shaw, 478 U.S. 310, 311 (1986), equitable, judge-fashioned remedies are unavailable in the absence of clear direction from Congress. United States Shoe, 296 F.3d at 1386.

Arbon Steel argued to the Court of International Trade that it was due interest under 19 U.S.C. § 1505(b), various constitutional theories, and a common law entitlement to interest on tax refunds. The court denied interest and Arbon Steel filed this timely appeal.

We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(5).

Discussion

We review statutory interpretation by the Court of International Trade without deference. Saarstahl AG v. United States, 78 F.3d 1539, 1542 (Fed. Cir. 1996). Constitutional interpretation is also a question of law, which we review de novo. Florida Sugar Mktg. & Terminal Assoc., Inc. v. United States, 220 F.3d 1331, 1333 (Fed. Cir. 2000).

Arbon Steel argues that interest is due under 28 U.S.C. § 2411 because it embodies the common law rule that interest is always recoverable against the government for an overpayment of internal-revenue tax in the absence of a statutory waiver of sovereign immunity. The Supreme Court, however, has determined that section 2411 does not codify such a rule, but itself serves as a waiver of immunity. Shaw,

478 U.S. at 319 ("When Congress has intended to waive the United States' immunity with respect to interest, it has done so expressly . . . See, e.g., 28 U.S.C. § 2411 (expressly authorizing prejudgment and postjudgment interest payable by the United States in tax-refund cases).").

Arbon Steel also says that section 2411 applies because the Harbor Maintenance Tax is an internal-revenue tax. Although labeled a "tax," the Harbor Maintenance Tax statute requires that "[e]xcept to the extent otherwise provided in regulations, all administrative and enforcement provisions of customs laws and regulations shall apply in respect of the tax . . . as if such tax were a customs duty." 26 U.S.C. § 4462(f)(1) (2000). We interpreted "administration and enforcement" to encompass the collection of the tax and the issuance of refunds, and concluded that these functions were to be governed by customs laws. Int'l

Bus. Machs., 201 F.3d at 1372. Therefore, because it relates to internal-revenue taxes, section 2411 does not apply here. Id. at 1373. Arbon Steel responds that International Business Machines was wrongly decided, but we are bound by it. See Newell Cos., Inc. v. Kenney Mfg. Co., 864 F.2d 757, 765 (Fed. Cir. 1988).

Arbon Steel next argues that the denial of prejudgment interest under section 2411 constitutes a deprivation of property without due process because any unconstitutional tax is arbitrary and capricious per se. However, the tax was not so arbitrary as to rise to a violation of due process because it served the rational purpose of maintaining the ports. United States Shoe, 296 F.3d at 1384. And the retention of interest is not a violation of the Due Process Clause either because the interest accrued on the payment of the tax was not Arbon Steel's property of which it could be deprived. Id. ("The tax revenue here . . . became

the property of the Treasury upon payment, and was appropriated to the Harbor Maintenance Trust Fund . . . Accordingly, the interest earned on the tax payments is also the property of the government.").

Conclusion

Accordingly, the judgment of the Court of International Trade is affirmed.

AFFIRMED

Slip Op. 01-144

UNITED STATES COURT OF INTERNATIONAL TRADE

SWISHER INTERNATIONAL, INC., Plaintiff,	:	
v.	:	Court No. 95-03-00322
UNITED STATES, Defendant.	:	
SONY ELECTRONICS, INC., and, ARBON STEEL & SERVICE CO., INC., Plaintiffs,	:	
v.	:	Court No. 98-07-02438
UNITED STATES, Defendant.	:	

[Summary judgment for defendant.]

Dated: December 11th, 2001

McKenna & Cuneo, L.L.P. (Peter Buck Feller, Daniel G. Jarcho, and Joseph F. Dennin) for plaintiff Swisher.

Galvin & Mlawski (John J. Galvin) for plaintiffs Sony Electronics, Inc., and Arbon Steel& Service Co., Inc.

Robert D. McCallum, Jr., Assistant Attorney General, David M. Cohen, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (Jeanne E. Davidson, Todd M. Hughes, and Jeffrey A. Belkin), Richard McManus Office of the Chief Counsel, United States Customs Service, of counsel, for defendant.

Coudert Brothers (Steven H. Becker and Paul A. Horowitz) for amici HMT Plaintiffs' Steering Committee.
Baker & McKenzie (Susan G. Braden, William D. Outman, Kevin M. O'Brien, Teresa A. Gleason, Michael E. Murphy) for amicus IBM.

OPINION

RESTANI, Judge: This action is before the court on cross-motions for summary judgment pursuant to USCIT R. 56. The sole issue is whether plaintiffs are entitled to prejudgment interest on fees paid under the export provision of the Harbor Maintenance Tax ("HMT").

Jurisdiction

This court has jurisdiction pursuant to 28 U.S.C. § 1581(a) for claims based on protest of refund denials. See Swisher Int'l, Inc. v. United States, 205 F.3d 1358, 1364 (Fed. Cir.2000), cert. denied, 581 U.S. 1036 (2000). The court has jurisdiction under 28 U.S.C. 1581(i) for claims not arising from administrative proceedings. See United States Shoe Corp. v. United States, 114 F.3d 1564, 1570 (Fed. Cir. 1997).

Standard of Review

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." USCIT R. 56(c).

Background

The HMT is an ad valorem tax on commercial cargo involved in "any port use." See 26 U.S.C. § 4461(a) (1996). In United States Shoe Corp. v. United States, 19 CIT 1284, 1289, 907 F. Supp. 408, 413 (1995), the court held that the HMT, as applied to exports, violated the Export Clause of the Constitution. See U.S. Const., Art. I, § 9, cl. 5. The court later awarded judgment for plaintiffs in the form of a refund of the principal amount paid "together with interest." See United States Shoe Corp. v. United States, 19 CIT 1413, 1413, 924 F. Supp. 1191, 1191 (1995).

The court subsequently noted that the question of interest was "not a matter without controversy and it cannot be resolved as a simple clerical matter." U.S. Shoe, 20 CIT 206, 207 (1996). Although the court called for additional briefing on the question of whether exporters may recover interest, the U.S. Customs Service ("Customs") filed a notice of appeal from the court's earlier decision on the constitutional issue. As a result, the court's final order awarding interest in U.S. Shoe was not addressed on appeal. The CIT's decision holding the HMT unconstitutional was affirmed by the Federal Circuit, 114 F.3d 1564 (Fed. Cir. 1997), and by the U.S. Supreme Court, 523 U.S. 360 (1998).

After the Supreme Court's decision in U.S. Shoe, the CIT developed a test case procedure to resolve the remaining issues surrounding the HMT, including the award of prejudgment interest. See IBM v. United States, No. 94-10-00625, slip op. 98-78, WL 325156 (Ct. Int'l Trade June 17, 1998), was selected as the test case to determine whether prejudgment interest should be awarded on HMT refunds. In IBM, the CIT entered judgment for plaintiff, ordered a refund of the principal paid, and adopted its prior position awarding interest. See id. On appeal, the Federal Circuit reversed the

CIT's award of interest, holding that the statutory provisions in question did not provide the necessary authorization to award interest. See IBM v. United States, 201 F.3d 1367, 1369 (Fed. Cir. 2000), cert. denied, 531 U.S. 1185 (2001).

Various plaintiffs filed motions seeking additional proceedings on the issue of prejudgment interest. Because the Federal Circuit had only addressed statutory authorization for interest in IBM, plaintiffs Sony Electronics, Inc., and Arbon Steel & Service Co. Inc. ("Sony/Arbon") were granted leave to prosecute a complaint asserting various constitutional bases for the award of prejudgment interest.[1] Sony/Arbon argues that plaintiffs are entitled to interest under the Export Clause, the Takings Clause of the Fifth Amendment, the Fifth Amendment Due Process Clause, and under rights guaranteed by the Ninth and Tenth Amendments. Swisher International, Inc. ("Swisher") subsequently filed a motion for entry of judgment in which Swisher asserts similar constitutional claims as well as a statutory claim under 19 U.S.C. § 1505(b),[2] that Swisher argues was not addressed by the Federal Circuit in IBM.

Discussion

The federal government is immune from an award of interest absent an express waiver of sovereign immunity. See Library of Congress v. Shaw, 478 U.S. 310, 311 (1986); see also IBM, 201 F.3d at 1370. "Apart from constitutional requirements,

[1] Sony Electronics, Inc., v. United States was consolidated with Arbon Steel & Service Co. Inc., v. United States; No. 98-10-02987.

[2] The "new" statutory argument is limited to the claims falling under 28 USC § 1581(a), administrative protest denial jurisdiction.

in the absence of specific provision by contract or statute, or 'express consent ... by Congress,' interest does not run on a claim against the United States." Shaw, 478 U.S. at 317 (quoting United States v. Louisiana, 446 U.S. 253, 264-265 (1980), quoting Smyth v. United States, 302 U.S. 329, 353 (1937)). Swisher first argues that 19 U.S.C. § 1505(b) provides the express consent necessary to award Plaintiffs prejudgment interest here.

A. Section 1505(b)

The Harbor Maintenance Tax does not expressly authorize the payment of interest on HMT refunds. See IBM, 201 F.3d at 1371. Express consent may, however, be found "elsewhere." See id. (analyzing customs and internal revenue tax provisions to determine whether express consent exists). 26 U.S.C. § 4462(f) requires that all administrative and enforcement provisions of customs laws and regulations apply to the HMT as if it were a customs duty. See IBM, 201 F.3d at 1371 ("... even though the HMT is codified as an excise tax and is part of the Internal Revenue Code, Congress intended the administration and enforcement of the tax to be treated as if the tax was a customs duty."). Because the HMT is treated as a customs duty, Swisher argues that the express consent necessary to award interest can be found in 19 U.S.C. § 1505(b), the administrative provision regarding payment and refund of customs duties.

Section 1505(b) provides, in part, for the refund of excess duties, with interest, uponliquidation or reliquidation. 19 U.S.C. § 1505(b).[3] Swisher argues that because § 1505(b) provides for

[3] 19 U.S.C. § 1505(b) reads:
The Customs Service shall collect any increased or additional duties and fees due, together with interest thereon, or refund any excess moneys deposited, together with interest thereon, as determined on a liquidation or reliquidation. Duties, fees, and

an award of interest on refunds of excess monies deposited to pay duties, it should be construed to allow for an award of interest on refunds of the monies deposited to pay the HMT, which must be treated as duty under § 4462. The principal problem is that § 1505(b) is not designed to apply to the HMT.

The interest provision in §1505(b) applies where a refund has been determined after a liquidation or reliquidation. "It is clear in order for Customs to be liable for interest, a refund must be 'determined on a liquidation or reliquidation.' Indeed, under the statute it is a liquidation or reliquidation which triggers interest liability." Dal-Tile Corp. v. United States, 116 F. Supp. 2d 1309, 1314 (Ct. Int'l Trade 2000); see also Travenol Labs., Inc. v. United States, 118 F.3d 749 (Fed. Cir. 1997), 753 n. 5 (the "event that gives rise to interest liability is liquidation or reliquidation"); Novacor Chem. Inc. v. United States, 171 F.3d 1376, 1382 (Fed. Cir. 1999) (reliquidation "is the triggering event in a dispute surrounding an award of interest").

Under 19 C.F.R. § 159.1, liquidation is defined as the final computation of the duties or drawback accruing on an entry. "Liquidation (or reliquidation), therefore, determines whether there has been an overpayment or underpayment, and thus defines the basis upon which interest might be due." Travenol, 118 F.3d at 753. There has been no liquidation or reliquidation to trigger § 1505(b) here. Swisher argues, however, that Customs' initial denial of its refund request was effectively a liquidation and a new determination is equivalent to a reliquidation, thus triggering the interest provisions of § 1505(b), and distinguishing its procedural posture from that of the IBM plaintiffs, who did not seek an administrative decision from Customs.

[ftn. 3 cont'd.] interest determined to be due upon liquidation or reliquidation are due 30 days after issuance of the bill for such payment. Refunds of excess moneys deposited, together with interest thereon, shall be paid within 30 days of liquidation or reliquidation.

In IBM, the court rejected the argument that language regarding "liquidation" could be interpreted to include other actions by Customs. 201 F.3d 1367. The court looked to the actual purpose of § 1505(c),[4] which describes specifically how interest is determined:

> On its face, the statute contemplates an entirely different factual scenario from the one before us. However, amici suggest that by substituting the exporter for the "importer of record," the HMT quarterly report for the "entry," and Customs' acceptance of the HMT payment for "liquidation," we can apply § 1505(c) to provide interest on HMT refunds. We are without power to rewrite a Congressional enactment to make it fit a case for which it was clearly not intended, no matter how compelling the case, particularly in light of the Supreme Court's mandate that Congress must expressly consent to an award of interest. See Shaw, 478 U.S. at 314. Accordingly, § 1505(c) does not authorize interest on HMT refunds.

[4] 19 U.S.C. § 1505(c) reads as follows:

Interest assessed due to an underpayment of duties, fees, or interest shall accrue, at a rate determined by the Secretary, from the date the importer of record is required to deposit estimated duties, fees, and interest to the date of liquidation or reliquidation of the applicable entry or reconciliation. Interest on excess moneys deposited shall accrue, at a rate determined by the Secretary, from the date the importer of record deposits estimated duties, fees, and interest or, in a case in which a claim is made under section 1520(d) of this title, from the date on which such claim is made, to the date of liquidation or reliquidation of the applicable entry or reconciliation. The Secretary may prescribe an alternative mid-point interest accounting methodology, which may be employed by the importer, based upon aggregate data in lieu of accounting for such interest from each deposit data provided in this subsection.

IBM, 201 F.3d at 1374 (emphasis added). For precisely the same reason, this court is prohibited from rewriting § 1505(b).

The basic purpose of liquidation and reliquidation is to finalize duties owed, allow parties to protest the classification or valuation of goods and allow a remedy for both underpayment and overpayment. See Travenol, 118 F.3d at 753. Swisher wants HMT payments to be equated to customs duties, but does not and could not argue that it overpaid an otherwise valid customs duty because its goods were improperly classified or valued and is, therefore, entitled to a refund of the difference including interest. Such a claim would be properly asserted under § 1505(b). Instead, Swisher argues that any and all HMT payments should be construed as overpayments of an invalid customs duty, and, therefore, it is entitled to a refund of the entire amount with interest, even though Customs did not improperly classify or value goods.[5] This statute, like § 1505(c), contemplates an entirely different factual scenario than the one before the court. It seems clear that § 1505(b) was not created to provide recourse for an unconstitutional tax but was merely intended to remedy mistaken customs classifications and valuations. The court would have to stretch the meaning of its language in a way not permitted by the court in IBM to provide the remedy that Swisher suggests, and such judicial manipulation was precisely the focus of IBM.[6]

5. See While certain "fees" may be a liquidated and refunded), it is clear that these are not HMT payments but other fees paid by importers in addition to duties that are part of the duty liquidation process. Swisher argues that it is the equivalence of "customs duties" and HMT, not these miscellaneous fees and HMT, that is required by § 4462(f).

6 In IBM, the court recognized that 26 U.S.C. § 4462(f) provided for the HMT payments to be treated as customs duties for administrative and enforcement purposes, but still declined to substitute new terms for the statutory interest language in order to allow interestIBM, 201F.2d at 1371-74.

Moreover, if the court were to find that HMT refund decisions were the functional equivalent of a liquidation, the court would not only rewrite § 1505(b), but would necessarily alter the meaning of § 1505(c) as well. Section 1505(c) defines the period during which interest runs when a liquidation or reliquidation has determined that a refund is due. The period is between the date of the duty deposit until the date of entry liquidation or reliquidation. Because the two sections work hand in hand, the meaning of § 1505(c) would also change to read that the time of payment of the HMT, like the time of deposit of duties, marks the time at which interest begins to run. The Federal Circuit has plainly rejected such that interpretation of § 1505(c). See IBM, 201 F.3d at 1374.[7] Whether or not a refund denial is like an erroneous liquidation, the HMT payment is not a "duty" "deposit" paid on an "entry" by an "importer of record." Because the court is prohibited from rewriting § 1505(c), it is necessarily prohibited from rewriting § 1505(b).

Federal courts are required to strictly construe waivers of sovereign immunity. Shaw, 478 U.S. at 318.

> "[T]here can be no consent by implication or by use of ambiguous language. Nor can an intent on the part of the framers of a statute or contract to permit the recovery of interest suffice where the intent is not translated into affirmative statutory or contractual terms. The consent necessary to waive the traditional immunity must be express, and it must be strictly construed."

United States v. N.Y. Rayon Importing Co., 329 U.S. 654, 659 (1947). Accordingly, the court must find against awarding interest even where there is a compelling public policy to do so.

[7] HMT payments are not "deposits" within the meaning of § 1505(c), which become final upon liquidation.

Shaw, 478 U.S. at 318. This principle and the holding in IBM compel the court to find that § 1505(b) does not provide the express waiver of sovereign immunity necessary to award prejudgment interest on HMT export payments.

B. Export Clause

In Shaw, the Supreme Court acknowledged that "constitutional requirements" may permit the award of interest against the federal government in the absence of an express statutory or contractual waiver. 478 U.S. at 317. Plaintiffs argue that because the Export Clause is an "unqualified prohibition" on export taxes, see U.S. Shoe, 523 U.S. at 368, the remedy for a violation of the Export Clause necessarily includes a refund with interest. In Cyprus Amax Coal Co. v. United States, 205 F.3d 1369, 1373 (Fed Cir. 2000), the court recognized that the Export Clause "provides a cause of action with a monetary remedy," without independent statutory authorization. That does not equate, however, to a waiver of sovereign immunity for interest claims.

The Just Compensation Clause of the Fifth Amendment, also referred to as the Takings Clause, is the only provision of the Constitution that the U.S. Supreme Court has found to contain a clear waiver of sovereign immunity authorizing prejudgment interest. See, e.g., Shaw, 478 U.S. at 317; Smyth, 302 U.S. at 353; U.S. v. Alcea Band of Tillamooks, 341 U.S. 48, 49 (1951); Boston Sand & Gravel v. U.S., 278 U.S. 41, 47 (1928); Tillson v. U.S., 100 U.S. 43, 47 (1879). In Shaw, the Supreme Court implied that this "constitutional requirement" exception arises only in a taking under the Fifth Amendment. 478 U.S. 310, 317 n.5 (cites omitted). In fact, Plaintiff Sony quotes Merchants Matrix Cut Syndicate, Inc. v. U.S., 284 F.2d 456 (7th Cir. 1960) for the proposition that "with the exception of just compensation claims under the Fifth Amendment, interest is

not recoverable against the United States in the absence of an express provision to the contrary." As a matter of first impression, Plaintiffs ask the court to recognize a new waiver of sovereign immunity under the Export Clause.

Plaintiffs cite to Hatter v. United States, 38 Fed. Cl. 166, 182 (1997) ("Hatter VI"), for the proposition that the court may look beyond the Just Compensation Clause to find a constitutional waiver of sovereign immunity. In Hatter v. United States, 64 F.3d 647 (Fed. Cir.1995) ("Hatter IV"), the Federal Circuit held that assessing a social security tax for the first time on sitting federal judges gave rise to an action under the Compensation Clause of Article III. The Federal Circuit remanded the matter to the Court of Federal Claims to calculate damages. On remand, the Court of Federal Claims held that the remedy included interest because Article III, much like the Just Compensation Clause of the Fifth Amendment, created an affirmative requirement to pay and, therefore, the traditional rule against interest did not apply. See Hatter VI, 38 Fed. Cl. at 182-83 . Plaintiffs argue that because Swisher's claim, like Hatter VI, arises directly under the Constitution, the Export Clause requires an award of interest. The Federal Circuit, however, never addressed on appeal whether the Compensation Clause contained the necessary waiver of sovereign immunity and, therefore, there is no binding precedent before this court expanding the traditional rule.[8] Even if the court were to accept

[8] The 1997 Court of Federal Claims' decision in Hatter was one of many. See Hatter v. United States, 21 Cl.Ct. 786 (1990) ("Hatter I"), rev'd, 953 F.2d 626 (Fed.Cir.1992) ("Hatter II"), on remand, 31 Fed.Cl. 436 (1994) ("Hatter III"), rev'd, 64 F.3d 647 (Fed.Cir.1995) ("Hatter IV"), aff'd, 519 U.S. 801 (1996) ("Hatter V"), on remand, 38 Fed.Cl. 166 (1997) ("Hatter VI"). After the Court of Federal Claims awarded interest in Hatter VI, the Federal Circuit reversed and remanded the matter on a different issue. See Hatter v. U.S., 85 F.3d 1356 (Fed Cir. 1999) ("Hatter

Hatter VI's view of the Compensation Clause of Article III, Hatter VI does not provide the answer here.

Interest does not attach merely because a claim arises under the Constitution. It is the unique language of the Just Compensation Clause of the Fifth Amendment which requires prejudgment interest. See, e.g., Monangahela Navigation Co. v. United States, 148 U.S. 312, 325-26 (1893). While the Export Clause may be interpreted as money-mandating, see Cyprus Amax, 205 F.3d at 1373, it does not contain express language which requires that the government provide "just" compensation. It is the meaning embodied in the term "just compensation" which creates the requirement that the government provide a "full and exact equivalent" in the form of interest. See Olson v. United States, 292 U.S. 246, 254-55 1934). If the compensation clause of Article III of the Constitution requires payment of interest, it is because that particular clause contains an affirmative requirement for undiminished and timely paid compensation. The Export Clause merely contains a prohibition against government action.

[ftn. 8 cont'd.] VII"). The Hatter VII court did not address interest. That decision was later vacated and the opinion withdrawn so that the uld hear the matter en banc. See Hatter v. United States, 199 F.3d 1316 (Fed. Cir. 1999) ("Hatter VIII"). The Federal Circuit, without addressing the award of interest, again reversed the Court of Federal Claims on other grounds. See Hatter v. United States, 203 F.3d 795 (Fed. Cir. 2000) ("Hatter IX"), aff'd in relevant part, 532 U.S. 557 (2001) ("Hatter X"). In the course of Hatter's complicated history, the issue of interest was never addressed beyond Hatter VI and, therefore, was never the subject of any substantive appellate discussion.

The remedy for the prohibition may take various forms; it is not an absolute and affirmative requirement to restore Plaintiffs to their prior position. It is this affirmative requirement that fully waives sovereign immunity under the Just Compensation Clause of the Fifth Amendment and perhaps under Article III. Because the Export Clause does not contain that affirmative requirement, the court cannot construe the clause as the full and express waiver of sovereign immunity necessary to allow prejudgment interest.

C. Fifth Amendment Taking

Plaintiffs argue that the imposition of the HMT on exports was a taking under the Fifth Amendment and, therefore, the traditional rule against interest does not apply. The Takings Clause of the Fifth Amendment guarantees that private property shall not be taken for public use without just compensation. See U.S. Const. amend. V. A Fifth Amendment takings claim requires a two-step analysis. First, Plaintiff must establish that it possesses a compensable property interest. See, e.g., Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1014 (1992); Kaiser Aetna v. U.S., 444 U.S. 164, 179-180 (1979). Plaintiff must then show that the United States, through a valid act of Congress, took that private property interest for public use without just compensation. See Short v. U.S., 50 F.3d 994, 1000 (Fed. Cir. 1995).

To satisfy the first requirement, Plaintiffs argue that its invalidly extracted money is a property interest protected under the Fifth Amendment citing Board of Regents v. Roth, 408 U.S. 564, 571-72 (1972) ("[T]he property interests protected by procedural due process extend beyond actual ownership of real estate, chattels, or money."). Generally, taxation is not considered to be a taking because the monies paid are not a recognizable protected property interest. See, e.g., United States

v. Sperry Corp., 493 U.S. 52, 53 (1989) (holding that a deduction of a tribunal user fee from a settlement award is not a taking); Commercial Builders v. Sacramento, 941 F.2d 872, 876 (9th Cir. 1991) (holding that a purely financial exaction does not constitute a taking); Coleman v. C.I.R., 791 F.2d 68, 70 (7th Cir. 1986) (holding that taxes are not takings, unless the Government tries to "achieve through special taxes what the Takings Clause of the Fifth Amendment forbids if done directly."); Atlas Corp. v. United States, 895 F.2d 745, 756 (Fed. Cir. 1990) ("Requiring money to be spent is not a taking of property");Commonwealth Edison Co. v. United States, 46 Fed. Cl. 29, 40 (2000) (same); Branch v. United States, 69 F.3d 1571, 1576 (Fed. Cir. 1995) (rejecting the argument that a federal statute constituted a taking, "because the property allegedly taken was money).

A limited number of courts have suggested that a tax may be a taking, but only if the tax is confiscatory. "Levying of taxes does not constitute a Fifth Amendment taking unless the taxation is so 'arbitrary as to constrain to the conclusion that it was not the exertion of taxation, but a confiscation of property.'" Quarty v. United States, 170 F.3d 961, 969 (9th Cir. 1999) (quoting Brushaber v. Union Pac. R.R. Co., 240 U.S. 1, 24 (1916)). To prove that the tax HMT is confiscatory, Plaintiffs must establish that the tax was not reasonably related to a substantial public purpose. See Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 127 (1978). An act intended to fund the maintenance of this country's harbors is clearly related to a substantial public purpose and, therefore, the HMT on exports was not confiscatory.

Plaintiffs argue that an unconstitutional tax is an ipso facto taking. Plaintiffs quote the concurring opinion of Justice Scalia in Reynoldsville Casket Co. v. Hyde: "if a plaintiff seeks the return of money taken by the government in reliance on an unconstitutional tax law, the court ignores the tax law, finds the taking of the property wrongful, and provides a remedy." 514

U.S. 749, 760 (1995). (Emphasis in Plaintiff's Brief.). Plaintiffs reliance on Reynoldsville Casket is misplaced. The majority opinion recognized that the remedy for an unconstitutional tax is not, as Plaintiffs would argue, the same as if a taking had occurred but depends upon the underlying factor that rendered the tax unconstitutional. See id. at 755 (citing McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco, 496 U.S. 18 (1990)). In McKesson, 496 U.S. at 51-52, the Supreme Court recognized that the remedy for an unconstitutional tax may not even be the repayment of the tax, but in the case of a discriminatory tax may involve the levying of an additional, offsetting tax. If, as Plaintiffs suggest, an unconstitutional tax is an ipso facto taking, the remedy would be limited to just compensation, and could not in some cases be cured by the levy of additional taxes. While it is clear that a remedy involving an additional tax is inapplicable here, it is equally clear that the remedy for an unconstitutional tax is not necessarily the remedy for a taking. The flexibility of remedy supports the argument that payment of a tax, unconstitutional or not, is not a property interest protected under the Takings Clause of the Fifth Amendment.

Even if Plaintiffs' unconstitutionally exacted money was a recognized protected property interest, Plaintiffs fail to satisfy the second step of the takings analysis. The HMT does not constitute a taking because the HMT was not a valid exercise of Congress' power of eminent domain. The HMT on exports was an unauthorized use of Congress' otherwise valid power to tax under Article I of the Constitution, not a valid exercise of the government's power of eminent domain. See U.S. Shoe, 523 U.S. 360. "[T]he power of taxation should not be confused with the power of eminent domain. Each is governed by its own principles." Houck v. Little River Drainage Dist., 239 U.S. 254, 264 (1915). Because Congress was not exercising its power of eminent domain in passing the HMT, a takings analysis is inappropriate.

Moreover, the HMT was not a valid act of Congress. "[A] taking claim must be premised upon a government action that is either expressly or impliedly authorized by a valid enactment of Congress." Dureiko v. United States, 209 F.3d 1345, 1359 (Fed. Cir. 2000). Plaintiff's entire argument is premised on the notion that the HMT was an invalid, unconstitutional act. Plaintiff cannot now argue that the HMT was simultaneously a valid exercise of the federal government's power of eminent domain. Because the HMT was not a valid exercise of Congress' power of eminent domain and because the monies paid are not a property interest protected under the Fifth Amendment, the HMT is not subject to a takings analysis. Consequently, Plaintiffs are not entitled to interest under the Takings Clause of the Fifth Amendment.

D. Fifth Amendment Due Process

Sony/Arbon argues that imposition of the HMT on exports was a violation of Plaintiffs' substantive due process rights. The Fifth Amendment of the U.S. Constitution states that no person shall be deprived of life, liberty or property without due process of law. See U.S. Const. amend. V. The standard of review governing a due process challenge to a taxing statute is "whether the taxing statute is so arbitrary and capricious as to amount to a denial of due process." Pledger v. C.I.R., 641 F.2d 287, 292 (5th Cir. 1981). A tax will not constitute a deprivation of property under the Due Process Clause unless it is so arbitrary as to be confiscatory. See Quarty, 170 F.3d at 969 (quoting Brushaber, 240 U.S. at 24). Plaintiffs argue that an unconstitutional tax is per se confiscatory.

In Sperry, 493 U.S. at 65, the Court held that a Congressional act is not a violation of the Due Process Clause if it is rationally related to a legitimate public purpose. The HMT was intended to finance the general maintenance of U.S. ports. S. Rep. No. 99-126, at 9-10 (1985), reprinted in 1986 U.S.C.C.A.N. 6639, 6646-47. Funding the maintenance of U.S. ports by charging those parties that use the ports is an otherwise valid exercise of Congress' power to tax for a legitimate public purpose. While one provision of the HMT was found unconstitutional, that is insufficient to render the tax so arbitrary and capricious as to violate Plaintiffs' rights under the Due Process Clause of the Fifth Amendment.

Even if the HMT did violate the Due Process Clause, Plaintiffs fail to provide any support for their claim that an award of interest is constitutionally required to remedy such a violation. "[N]o language in the [Fifth Amendment Due Process Clause] itself requires the payment of money damages for its violation." Murray v. U.S., 817 F.2d 1580, 1583 (Fed. Cir. 1987). Even though a tax is declared unconstitutional pursuant to the Due Process Clause, the remedy does not necessarily include a refund, McKesson, 496 U.S. at 51, much less interest. As a result, Plaintiffs' Due Process claims fail.

D. Ninth and Tenth Amendments

Plaintiffs Sony/Arbon lastly argue that the HMT need not contain a waiver of sovereign immunity because the doctrine of sovereign immunity does not apply here. Citing North Am. Co. v. SEC, 327 U.S. 686, 704-05 (1946), Plaintiffs argue that the United States is not an "absolute sovereign" and, more importantly, that Congress was acting outside of its sovereign role when it passed the unconstitutional HMT on exports. Plaintiffs argue that Congress' passage of the HMT on exports was, in fact, an exercise of "a different and forbidden power" that infringed upon rights protected under the 9th and 10th Amendments.

The Ninth Amendment provides that "[t]he enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. Const. amend. IX. In United States v. Choate, 576 F.2d 165, 181 (9th Cir. 1978), the court held that the rights protected by the Ninth Amendment are those that are so basic and fundamental and deeply rooted in our society as to be "essential rights" but which, nevertheless cannot find direct support elsewhere in the Constitution (quoting Griswold v. Connecticut, 381 U.S. 479, 488-89 (1965)). The Tenth Amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited to it by the states, are reserved to the states respectively or to the people." U.S. Const. amend. X. Plaintiffs cite to Kansas v. Colorado, 206 U.S. 46, 90 (1907), for the proposition that the principal purpose of the Tenth Amendment was to reserve to the people all power not granted to the federal government or to the states. Plaintiffs reason that "the sovereign power to tax exports remains the exclusive province of the 'sovereign People' of this Nation under the Ninth and Tenth Amendments," Plaintiff Sony's Brief at 15. (emphasis in original), and therefore, the HMT on exports was not imposed by the federal government in its capacity as a sovereign.

Taken to its logical conclusion, Plaintiffs argue that any act passed by Congress which is later declared unconstitutional would automatically be a violation of the Ninth and Tenth Amendments because it was beyond Congress' power to pass in the first place. Plaintiffs cite no support for this proposition. In addition, Plaintiffs fail to identify any case that provides for prejudgment interest as a remedy for a Ninth or Tenth Amendment violation. Accordingly, the court finds that Plaintiffs are not entitled to interest under the Ninth or Tenth Amendment.

Conclusion

The court finds that Plaintiffs are not entitled to prejudgment interest under § 1505(b), the Export Clause, the Takings Clause, the Due Process Clause of the Fifth Amendment, or the Ninth and Tenth Amendments. The court grants summary judgment for Defendant.

Jane A. Restani
JUDGE

Dated: New York, New York
This 11th day of December, 2001.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. CONSTITUTION, Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

26 U.S.C. 4462 – Harbor Maintenance Tax

(f) Extension of provisions of law applicable to customs duty

(3) Administrative provisions applicable to tax law not to apply

the tax imposed by this subchapter shall not be treated as a tax for purposes of subtitle F or any other provision of law relating to the administration and enforcement of internal revenue taxes.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS (Cont'd.)

28 U.S.C. 2411.

In any judgment of any court rendered (whether against the United States, a collector or deputy collector of internal revenue, a former collector or deputy collector, or the personal representative in case of death) for any overpayment in respect of any internal-revenue tax, interest shall be allowed at the overpayment rate established under section 6621 of the Internal Revenue Code of 1986 upon the amount of the overpayment, from the date of the payment or collection thereof to a date preceding the date of the refund check by not more than thirty days, such date to be determined by the Commissioner of Internal Revenue. The Commissioner is authorized to tender by check payment of any such judgment, with interest as herein provided, at any time after such judgment becomes final, whether or not a claim for such payment has been duly filed, and such tender shall stop the running of interest, whether or not such refund check is accepted by the judgment creditor.

28 U.S.C. 2516.

(a) Interest on a claim against the United States shall be allowed in a judgment of the United States Court of Federal Claims only under a contract or Act of Congress expressly providing for payment thereof.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS (Cont'd.)

Section 177 of the former Judicial Code, as amended by the Act of June 22, 1936 [ch. 690, § 808, 49 Stat. 1746]:

> (a) No interest shall be allowed on any claim up to the time of the rendition of judgment by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest, except as provided in subdivision (b).
>
> (b) In any judgment of any court rendered (whether against the United States, a collector or deputy collector of internal revenue, a former collector or deputy collector, or the personal representative in case of death) for any overpayment in respect of any internal-revenue tax, interest shall be allowed at the rate of 6 per centum per annum upon the amount of the overpayment, from the date of the payment or collection thereof to a date preceding the date of the refund check by not more than thirty days, such date to be determined by the Commissioner of Internal Revenue.
>
> The Commissioner is hereby authorized to tender by check payment of any such judgment, with interest as herein provided, at any time after such judgment becomes final, whether or not a claim for such payment has been duly filed, and such tender shall stop the running of interest, whether or not such refund check is accepted by the judgment creditor.

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(2)

No. 02-1512

In the Supreme Court of the United States

ARBON STEEL & SERVICE CO., INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

THEODORE B. OLSON
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4 pp

QUESTION PRESENTED

Whether 28 U.S.C. 2411 or the Fifth Amendment to the Constitution authorizes an award of pre-judgment interest on a judgment for the return of fees collected by the United States under the Harbor Maintenance Tax, 26 U.S.C. 4461.

In the Supreme Court of the United States

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ARBON STEEL & SERVICE CO., INC., PETITIONER

v.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2-10) is reported at 315 F.3d 1332. The opinion of the Court of International Trade (Pet. App. 11-29) is reported at 178 F. Supp. 2d 1354.

JURISDICTION

The judgment of the court of appeals was entered on January 10, 2003. The petition for a writ of certiorari was filed on April 10, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(l).

STATEMENT

1. Petitioner is an exporter of goods. Pursuant to this Court's decision in *United States* v. *United States Shoe Corp.*, 523 U.S. 360 (1998), petitioner received a

refund of payments it made to the United States under the Harbor Maintenance Tax, 26 U.S.C. 4461. The Court of International Trade, however, denied petitioner's claim for pre-judgment interest on the amount of that refund. Pet. App. 11-29.

2. Relying in large part on its prior decisions in *International Business Machines Corp.* v. *United States*, 201 F.3d 1367 (2000), cert. denied, 531 U.S. 1183 (2001), and *United States Shoe Corp.* v. *United States*, 296 F.3d 1378 (Fed. Cir. 2002), petition for cert. pending, No. 02-1221 (filed Feb. 19, 2003), the court of appeals affirmed. Pet. App. 2-10.

ARGUMENT

This case presents the same questions presented in *United States Shoe Corp.* v. *United States*, No. 02-1221. The petition in this case should be denied for the same reasons set forth in the brief in opposition to the petition for a writ of certiorari in *United States Shoe Corp.*, No. 02-1221.*

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

MAY 2003

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* We are serving herewith to petitioner a copy of the brief in opposition filed by the government in *United States Shoe Corp.* v. *United States*, No. 02-1221.